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IN THE

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Supreme Court of the United States

OCTOBER TERM, 1940.

No. 610.

J. TOM WATSON (GIBBS), individually and as Attorney
General of the State of Florida, *et al.*, *Appellants*,

v.

GENE BUCK, individually and as President of the American
Society of Composers, Authors and Publishers, *et al.*,

No. 611.

GENE BUCK, individually and as President of the American
Society of Composers, Authors and Publishers, *et al.*,
Appellants,

v.

J. TOM WATSON (GIBBS), individually and as Attorney
General of the State of Florida, *et al.*,

ON APPEALS FROM THE DISTRICT COURT OF THE UNITED STATES
FOR THE NORTHERN DISTRICT OF FLORIDA.

SUPPLEMENTAL REPLY BRIEF OF APPELLEES IN
NO. 610, AND APPELLANTS IN NO. 611 (PLAIN-
TIFFS BELOW).

THOMAS G. HAIGHT,
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Counsel for Plaintiffs.

May, 1941.

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NO. 610, AND APPELLANTS IN NO. 611 (PLAINTIFFS BELOW).

PLAINTIFFS' SUPPLEMENTAL MEMORANDUM.

Upon the argument the court requested a further memorandum relating to the substitution of Hon. J. Tom Watson, the present Attorney General of the State of Florida, as a

defendant in place of his predecessor, Hon. George Couper Gibbs. In addition to that matter, counsel for plaintiffs, in answer to a question of the Chief Justice, stated that he would point out the portions of the consent decree which permit the plaintiff Society to issue blanket licenses.

I.

The Court Below Properly Found that George Couper Gibbs had Threatened to and Would Enforce the State Statutes Against the Plaintiffs Unless Enjoined. J. Tom Watson, Present Attorney General of the State of Florida, Should be Substituted as a Defendant in Place of Said George Couper Gibbs.

(a) The court below found (R. II, 1089):

"Defendants have threatened to and will enforce such State Statutes against these Complainants and others similarly situated in the event that such Complainants and others similarly situated refuse to comply with said State Statutes or do any of the acts made unlawful by said State Statutes."

That finding was justified by the admissions made by the defendants in their answer as well as in argument before this Court and the court below.

(b) When this suit was brought on February 7, 1938, and a temporary injunction obtained on April 4, 1938, the Attorney General of the State of Florida was the late Cary D. Landis (Complaint R. I, 1; Temporary Injunction, R. I, 84).

(c) On April 25, 1938, an appeal was taken to this Court from said temporary injunction. Before the argument of that appeal and on May 10, 1938, the said Cary D. Landis died. George Couper Gibbs was appointed as his successor on May 16, 1938.

(d) On May 31, 1938, the defendants filed a motion in the court below to vacate the temporary injunction and to dismiss the complaint on the ground that the action had abated upon the death of Mr. Landis. Plaintiffs thereupon moved in that court for an order substituting the said George Couper Gibbs as a defendant in place of Mr. Landis. Both motions were denied on June 11, 1938, the court stating that "the supplemental bill, for which leave to file is asked, in effect substitutes Honorable George Couper Gibbs as a party defendant in the place of Honorable Cary D. Landis, deceased. On authority of *ex parte* LaPrade, 289 U. S. 444 said motion is denied."

(e) Thereafter, on August 15, 1938, defendants renewed their motion in this Court and on September 16, 1938, plaintiffs renewed their motion in this Court.

(f) Plaintiffs' said motion on file in this Court outlined all the foregoing facts and annexed a proposed supplemental bill of complaint to be filed against the said George Couper Gibbs wherein plaintiffs alleged the following:

"7. During the lifetime of Cary D. Landis, deceased, he was represented by Tyrus A. Norwood as his assistant, who at all times acted on his behalf and under his direction. At all times since the appointment of said George Couper Gibbs, the said Tyrus A. Norwood has continued to act under the direction of said George Couper Gibbs, with the same effect and in the same manner as he acted for the late Cary D. Landis, since the enactment of the said State Statute.

"8. The late Cary D. Landis through his said assistant, Tyrus A. Norwood, threatened to enforce the State Statute and the penalties thereof against complainants if they should violate or attempt to violate any of the provisions thereof, and more particularly threatened to prosecute complainants thereunder should they attempt to sue for infringement of their copyrights in any Federal Court in the State of Florida. Such threat was made in open court on the application for interlocutory injunction, and by the following letter written on March 7, 1938.

“ ‘State of Florida,
“ ‘Office of the Attorney General,
“ ‘Tallahassee.

“ ‘March 7, 1938

“ ‘Honorable Rufus E. Foster,
Judge, United States Circuit Court of Appeals,
New Orleans, Louisiana.

“ ‘Re Gene Buck *et al.* vs. State of Florida *et al.*

“ ‘Dear Judge Foster:

“ ‘Since returning from New Orleans I have been thinking that a statement I made before you in the argument of the above case to the effect that ‘if the plaintiffs in this case sued for an infringement of their copyrights in the Federal Courts within the State of Florida, that the Attorney General and State’s Attorneys would not prosecute them’, was not absolutely clear.

“ ‘In order to be fair to the Court, I would like to state that what I meant by the above remark was that the Attorney General and the State’s Attorneys of this State would not prosecute any of the individual complainants if they brought suit in the Federal Courts of this State against persons residing within the State for infringement of copyrights, but if the Society known as the American Society of Composers, Authors and Publishers should bring suit in the Federal Court for infringement, or a suit on any of the licenses which it has issued, the Attorney General and State’s Attorneys would be compelled to prosecute it under the provisions of Section 1 of the Act, regardless of whether the suit was brought in the State or Federal Courts.

“ ‘Yours very truly,
“ ‘(Signed) CARY D. LANDIS,
“ ‘Attorney General,
“ ‘By TYBUS A. Norwood,
“ ‘Assistant Attorney General.

“ ‘TAN-a

" "CC: Hon. A. V. Long, Gainesville, Florida.

" "Hon. Louis W. Strum, Jacksonville, Florida.

" "Hon. Frank Wideman, West Palm Beach, Florida."

"9. Upon information and belief, said Tyrus A. Norwood has been instructed by said George Couper Gibbs to act in his capacity as Assistant Attorney General in appearing for the State's Attorneys in this action; the purpose and object of the appearance of said Tyrus A. Norwood in this action since the death of the late Cary D. Landis, has at all times been to have the interlocutory injunction heretofore entered herein vacated so that the said George Couper Gibbs and the said Tyrus A. Norwood and the said defendant State's Attorneys will be free to enforce the terms and provisions of the State Statute against the complainants herein.

"10. Said George Couper Gibbs directly and through his assistant, Tyrus A. Norwood, has adopted and continues and threatens to adopt and continue the action of his predecessor Cary D. Landis, deceased, in enforcing the State Statute, which is in violation of the Constitution of the United States; upon information and belief, said George Couper Gibbs, individually and as an official charged with the duties of enforcing said State Statute will enforce said State Statute in each and all of its terms, and the whole thereof, and particularly against these complainants and others similarly situated, individually and as members of the Society, in the event that such complainants and others similarly situated refused to accept or submit to a system of compulsory licensing; and said George Couper Gibbs will enforce the penal and confiscatory provisions of such Statute against complainants and others similarly situated in the event complainants and others similarly situated attempt to enforce the existing contracts between themselves and the Society and between the Society and citizens and residents of the State of Florida; or license or attempt to license persons, firms or corporations to publicly perform outside of the State of Florida musical compositions, which performances may be reproduced and reperformed within the State of Florida; or enter into license agreements without the State of Florida with residents or citizens of that State for the right or license to perform publicly for profit

the musical compositions of the complainant and others similarly situated within the State of Florida; or enter into license agreements within the State of Florida with persons, firms or corporations, residents or citizens of that State, for the purpose of licensing them to publicly perform for profit the musical compositions of complainants and others similarly situated within or without the State of Florida; or take any means to detect infringements of their copyrighted musical works within the State of Florida; or bring any suits for infringement of their copyrights in their respective compositions by means of public performances for profit in the Federal Courts within or without the State of Florida; or fail or refuse to submit to the jurisdiction of the State Courts of Florida; and said George Couper Gibbs has threatened in the event of the aforesaid contingencies, or any of them, to enforce the penalties provided for in said State Statute, and to proceed to prosecute complainants and others similarly situated, their employees and agents, criminally, for an alleged violation of said Statute."

(g) Thereafter, on October 10, 1938, this Court denied defendants' motion to vacate the decree and granted plaintiffs' motion to substitute. The order granting plaintiffs' motion is printed at R. I, 94.

(h) The appeal from the temporary injunction was argued in this Court on January 9, 1939, and the decision of this Court affirming the temporary injunction was announced on April 17, 1939. This Court's opinion stated:

"The allegations in the bill of threats of enforcement and the declaration in the affidavit of the Attorney General of the State, the officer charged with supervision of enforcement, of readiness and willingness 'to prosecute any violations of said act' sufficiently establish the immediate danger from enforcement."

(i) The affidavit of the Attorney General referred to in that opinion is one made by the late Cary D. Landis on February 28, 1938, shortly after this action was instituted. In that affidavit Mr. Landis stated (Record on Appeal from Temporary Injunction, 211):

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"That, although he has been and is ready and willing to prosecute any violations of said Act, no violations thereof have been called to his attention, and, upon information and belief, avers that there has been no violation of said act in this State since its passage. That he has not, and has not authorized anyone on his behalf to, threaten anyone for the prosecution of said Chapter 17807, Laws of Florida, 1937."

(j) It is obvious from that affidavit that Mr. Landis drew a distinction between his intention to enforce the statute if violated and the making of actual threats of prosecution. This Court, however, held that an intention to enforce a statute whose penalties are so drastic that a person affected by it will not dare to violate the statute, is sufficient to invoke the equity jurisdiction of the Federal Court as announced in *ex parte Young*, 209 U. S. 123, 165; *Terryce v. Thompson*, 263 U. S. 197, 215; *Gibbs v. Buck*, 307 U. S. 66, footnote 18.

(k) After the decision of this Court plaintiffs filed in the court below the supplemental bill of complaint referred to in paragraph "(f)" above. On June 6, 1939, defendants moved to dismiss the original and supplemental bill on the ground that Sections 2 (a), 2 (b) and 6 of the 1937 law had been repealed "and that with those sections repealed, said statute is patently within the police power of said State" (R. I, 100).

(l) Thereafter defendants filed their answer in which they admitted the allegations contained in Paragraph 7 of the complaint (set forth in paragraph "(f)" above; R. I, 95); admitted writing the letter of Mr. Nerwood quoted in Paragraph 8 (R. I, 96); substantially denied the allegations of paragraph 9 and answered Paragraph 10 by denying that the defendant George Couper Gibbs "has made any such threats as are alleged in said paragraph", and further alleges that Sections 2 (a), 2 (b) and 6 of the 1937 Act were repealed by the 1939 act (R. I, 108).

With respect to Paragraph 10 of the supplemental complaint, the denials and implied admissions (by failure to

deny) by Mr. Gibbs are in substantially the same form as in the affidavit of the late Cary D. Landis, mentioned in paragraph "(i)" above, and referred to in the opinion of this Court on the appeal from the temporary injunction. In other words, Mr. Gibbs admitted that he "will enforce said statute in each and all of its terms, and the whole thereof" (Supp. Complaint Par. 10, R. I, 197), if plaintiffs should violate the same; but he denied that he had threatened to enforce the statute, presumably upon the theory announced by his predecessor that "no violations thereof have been called to his attention".

Mr. Gibbs did not deny the allegation of Paragraph 10 that he "directly and through his assistant Tyrus A. Norwood, has adopted and continues * * * to adopt and continue the action of his predecessor, Cary D. Landis, deceased, in enforcing the state statute * * *" (R. I, 97).

(m) Upon that state of the pleadings, the plaintiffs did not feel called upon to compel the Attorney General to take the witness stand so that his state of mind could be examined. It was felt that the admissions contained in his pleadings were sufficient. The court below apparently was of the same opinion and it was upon that basis as well as upon the statements of Mr. Ellis, the Assistant Attorney General who tried the case below, that said finding was made. Mr. Ellis said (R. I, 478):

"The state and the Attorney General are charged with the administration of the 1939 act; the '37 act has not been superseded. *We are considerably interested, however, in sustaining the acts and policies of the acts* * * *."

Mr. Ellis further stated (R. I, 481):

"I don't think, your honor, that there are any dispute of facts * * *."

(n) Neither defendants' assignments of error nor the specifications of errors relied on challenge the court's finding that defendants have threatened to and will enforce the state statutes unless enjoined.

(o) In addition to the foregoing, plaintiffs and defendants, including the said J. Tom Watson, joined in the pending motion in this Court to substitute Mr. Watson for Mr. Gibbs pursuant to 28 U. S. C., Sec. 780 and Rule 19, Subdivision 4 of the Rules of this Court, wherein Mr. Watson admits:

"4. Said J. Tom Watson has adopted and continues, and proposes to continue, the same course of conduct in the enforcement of the statutes of the State of Florida, involved in these appeals, that was adopted by his predecessor in office, said George Couper Gibbs, in enforcing said State Statutes.

"5. There is a substantial need for continuing this suit against said J. Tom Watson, individually and as Attorney General of the State of Florida, as grave and important questions of constitutional law are herein involved."

(p) Upon the argument of this cause Mr. Norwood, the Assistant Attorney General who has appeared in this case on behalf of all three Attorney Generals (Messrs. Landis, Gibbs and Watson), stated that the defendants would enforce all provisions of the 1937 act and the 1939 act except Sections 2 (a), 2 (b) and 6 of the 1937 act.

(q) When the same question was before this Court on the previous application to substitute Judge Gibbs for Mr. Landis, the parties fully briefed the subject, discussing particularly the *LaPrade* case as well as *Allen v. Regents of University System*, 304 U. S. 439. The allegations of the present motion to substitute are identical with those of *Allen v. Regents, supra*, the provisions of Section 11 of the Act of February 13, 1935 (28 U. S. C., Sec. 780), Rule 19, Subdivision 4 of the Rules of this Court, and Rule 25, Subdivision (d) of the new Rules of Civil Procedure. The latter Rule requires only that it be shown that the successor "adopts or continues or threatens to adopt or continue the action of his predecessor * * *". The said J. Tom Watson admits that he "has adopted and continues, and proposes

to continue, the same course of conduct in the enforcement of the statutes * * * that was adopted by his predecessor in office".

II.

The Consent Decree Permits the Society to Issue Blanket Licenses Whereas the State Statutes Prohibit the Society from Doing so.

(a) The consent decree (Appendix B of Plaintiffs' Reply Brief (39-48); Appendix B of Defendants' Reply Brief (58-68)) permits the Society to continue to do business in the same form that it now does business except for the matters specifically enjoined by the decree. The decree does not contain an injunction against issuing blanket licenses. It merely provides that the Society shall not discriminate in price and terms between licensees similarly situated (Article 2, Subdivision 2, Plaintiffs' Reply Brief, 41).

(b) As to radio broadcasters, it provides that the Society shall not, *if required by such broadcasters*, refuse to offer a per program basis of compensation (Pl. Repl. Br. 42). It further provides that if the Society offers a program license and a license based upon any other method of compensation there must be such a relationship between the two methods of licensing as to give the broadcasters a bona fide option to accept one method or the other (Page 43).

(c) The program basis of licensing is a blanket license, as defined by Section 1 of the 1939 Act, which states that the term blanket license "includes any device whereby public performance for profit is authorized of the combined copyrights of two or more owners", and that "the term 'blanket royalty or fee' includes any device whereby prices for performing rights are not based on the separate performance of individual copyrights" (Append. in Yellow Book, p. 104).

The program method of licensing required by the consent decree is one under which the combined copyrights of all the

members of the Society must be licensed at a price based upon the performance of unspecified compositions in a particular program. In other words, the consent decree requires a "blanket license" for a "blanket royalty or fee" as defined in Section 1 of the 1939 Act.

(d) With respect to users other than broadcasters the Society must not refuse to fix a price for specific compositions as requested by a prospective licensee (Subdivision 6, p. 44). In view of the fact that no known method has been devised for licensing on that basis, Subdivision 6 does not become effective until one year after the signing of the decree (Article V, p. 47). Even then the 32,000 users other than radio broadcasters who now have the Society's blanket license must elect to continue on a blanket license basis or to abandon the blanket license and substitute a basis of negotiation for a license for each composition. It is not likely that many users will resort to the latter option; yet the Florida statutes make it unlawful for the Society to issue a blanket license.

(e) The inconsistency between the consent decree and the Florida statutes is discussed at Pages 26 to 35 of plaintiffs' Reply Brief. It is there shown that acts which are required by the consent decree are made unlawful by the state statutes. In these respects if plaintiffs should refuse to offer licenses and fix prices as required in the consent decree, they will be in contempt of court; and if they do make such offers and fix such prices they will violate the state statutes and will be subject to the virtual confiscation of their copyrights in addition to the other severe penalties therein set forth.

(f) This inconsistency results from the attempt on the part of the State of Florida to invade two fields exclusively reserved to Congress, namely, the fields of copyright and interstate commerce. The consent decree, though entered pursuant to the commerce clause and the Sherman Act, is limited to copyrighted works. It does not attempt to em-

brace or interfere with the exercise of rights of literary property protected under the common law of the several states. If the several states wish to pass special laws relating to literary property they should likewise limit their legislation to the field of common law rights in such property and to intra-state transactions. The Florida statutes illustrate the conflicts which necessarily result when the states attempt to invade the field reserved to the Federal Government.

Respectfully submitted,

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